IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civ. Action Nos. 8690, 8685, 8691, and [illegible]

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JAN 17 1977
JAMES R. MANSPEAKER
CLERK
BY _____ DEP. CLERK

THE OIL SHALE CORP., et al.,

Plaintiffs,

v.

THOMAS S. KLEPPE, Secretary of the Interior,

Defendant.

ORDER

THIS MATTER arises pursuant to the mandate of the Court of Appeals in its opinion of September 22, 1975. The mandate was recalled by the Court of Appeals on March 1, 1976, and its reissuance was stayed through April 11, 1976, pending a timely petition for a writ of certiorari. On April 9, Plaintiffs filed for a writ of certiorari. On June 21, 1976, the Supreme Court denied the petition for certiorari. In accord with the suggestion of the Plaintiffs, made in their joint statement of January 12, 1976, this Court has refrained from ordering remand to the Department of the Interior until the related issues of discovery contained in Shell Oil Co. v. Kleppe, No. 74-F-739 (D.Colo.), have been decided. On January 7, 1977, this Court issued summary judgment for the Plaintiffs in that case, and decided the relevant issues of discovery therein.

ACCORDINGLY, it is hereby ORDERED that:

(1) Consolidated cases Umpleby v. Kleppe, No. C-8685, Napier v. Kleppe, No. C-8691, and Brown v. Kleppe, No. C-9302, are remanded to the Department of the Interior for further proceedings relating to the patent applications therein.

(2) Pursuant to the mandate of the Court of Appeals, the Department of the Interior will:

(a) consider and rule upon all possible obstacles to the patenting of these claims;

(b) handle these patent claims in an expedited fashion;

(c) receive all competent evidence on the issue of estoppel, which concerns the question of individual reliance by claimants upon the prior actions of the Department of the Interior regarding the effect of the assessment work contests; and

(d) correct any existing procedural errors made in prior proceedings.

(3) The Department of the Interior will consider the implications of our decision in Shell Oil Co. v. Kleppe, No. 74-F-739 (D.Colo., Jan. 7, 1977), wherever relevant to the issues raised at these proceedings.

(4) This Court will retain jurisdiction over The Oil Shale Corp. v. Kleppe, No. 8680, pending decision by the Department of the Interior with respect to the other cases in this consolidated action. While the Plaintiffs in No. 8680 need not file patent applications, the Court of Appeals and this Court urge those Plaintiffs to do so, and suggest that all the cases herein be consolidated in proceedings before the Department of the Interior. In the event that the claimants in No. 8680 file patent applications, the Court should be so notified immediately in order that we may issue an order remanding the case to the Interior Department.

(5) Upon completion of the administrative proceedings in these cases, the Department of the Interior shall immediately transmit a record of the proceedings to this Court, in order for us to fulfill the mandate of the Court of Appeals.

(6) The Plaintiffs are to advise the Court on March 1, 1977, and

on the first day of every other month thereafter, as to the status of the proceedings before the Department of the Interior.

DATED at Denver, Colorado, this 17 day of January, 1977.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court

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office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

History: L. 1961, ch. 28, § 11.

Failure to appoint as grounds for dissolution, 16-10-[illegible]

Cross-References:

Agent to be stated in articles, 16-10-49(j).

16-10-12. Change of registered office or registered agent.—A corporation may change its registered office or change its registered agent, or both, upon filing in the office of the secretary of state a statement setting forth:

(a) The name of the corporation.

(b) The address of its then registered office.

(c) If the address of its registered office be changed, the address to which the registered office is to be changed.

(d) The name of its then registered agent.

(e) If its registered agent be changed, the name of its successor registered agent.

(f) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(g) That such change was authorized by resolution duly adopted by its board of directors.

Such statement shall be executed by the corporation by its president or vice-president, and verified by him, and delivered to the secretary of state. If the secretary of state finds that such statement conforms to the provisions of this act, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.

Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the secretary of state, who shall forthwith mail a copy thereof to the corporation at its registered office. The appointment of such agent shall terminate upon the expiration of thirty days after receipt of such notice by the secretary of state.

History: L. 1961, ch. 28, § 12.

16-10-13. Service of process on corporation—Registered agent or secretary of state agents for receipt of service.—The registered agent so appointed by a corporation shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

Whenever a corporation shall fail to appoint or maintain a registered agent to this state, or whenever its registered agent shall not with reasonable diligence be found at the registered office, then the secretary of state shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving

determined the claims to be invalid. However, he found that the claimants had established that the oil shale deposits constituted a valuable resource for future use and development. Under the Freeman standard, he held all six claims to be valid, except for 35.4 acres of Harold Shoup No. 3 which were non-mineral in character, and are not before us on appeal.

The United States appealed the ruling to the Interior Board of Land Appeals (hereinafter the Board). The Board reversed the administrative law judge, and held the six claims to be null and void, explicitly overruling Freeman. The Board held that in order to satisfy the requirement of discovery of a valuable mineral deposit, it must be shown that the deposit could have been developed, extracted, and marketed at a reasonable profit on February 25, 1920 (the date of the withdrawal of oil shale lands from location), and at all subsequent times without substantial interruption, up to the time of the contest proceedings. The Board adopted Administrative Law Judge Darby's factual findings that despite considerable investment over the years in various techniques of extracting oil from oil shale, no prudent person was justified in believing the deposits could be presently developed, extracted and marketed at a reasonable profit.

The Board held that the claims here in issue had been filed not on the basis of their then current value--oil shale could not then be developed--but in anticipation that the oil shale would someday become a valuable mineral. The 1872 Mining Act had opened further land to exploration and purchase of "valuable mineral deposits". The overall effect of the Board's ruling was to invalidate 50,000 old mining claims. The Board's ruling expressly invalidated only six claims filed before 1920, but its precedent endangers all other pre-1920

oil shale claims covering at least 500,000 acres of Federal land in Colorado, Utah and Wyoming. One news article commented on the ruling in these words:

> But the board's ruling, unless appealed and reversed in court, would mean that no pre-1920 oil shale claim can be patented and these old claims would be open to department action invalidating them.

"Board Ruling Imperils Oil-Shale Claims," Denver Post (July 2, 1974).

The claimants seek review of the decision of the Department of Interior declaring their oil shale claims invalid. They contend that (1) the rule of discovery set out in Freeman is a proper application of the traditional and long-established requirements of the mining laws; (2) this rule has received Congressional review and approval; (3) the Interior Department is estopped from applying any other rule to the plaintiffs' claims; and (4) the United States Government has recognized oil shale deposits as valuable mineral deposits under the mining laws. These and other contentions are discussed in Parts III and VI below.

II

Final decisions of the Board of Land Appeals within the Department of Interior denying the validity of mining claims are clearly reviewable under the Administrative Procedure Act, 5 U.S.C. §701 et seq.; Nickol v. United States, 501 F. 2d 1389 (10th Cir. 1974). The issues raised by the parties in this case are within the scope of review, namely, whether the agency's ruling is supported by law and by substantial evidence. 5 U.S.C §706; Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 414 (1971); Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951); Henrikson v. Udall, 305 F. 2d 949, 950 (9th Cir. 1965), cert. denied, 384 U.S. 940 (1966).

III

Mining laws require the discovery of a valuable mineral deposit prior to the location of a valid claim. 30 U.S.C.§§ 22, 23, 25 and 29; Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920). The traditional definition of discovery is embodied in Castle v. Womble, 19 L.D. 455, 457 (1894);

> In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon fact, which ... show that with further work a paying and valuable mine, so far as human foresight can determine, will be developed.
>
> After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This definition has been consistently affirmed. United States v. Coleman, 390 U.S. 599 (1968); Best, supra; Cameron, supra; Christman v. Miller, 197 U.S. 313 (1905).

The "prudent-person test" in Castle v. Womble has been elaborated upon by the "marketability test," that is, whether the mineral can be removed and extracted at a profit:

> Under the mining law Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. (Footnotes omitted)

United States v. Coleman, supra at 602-603. The Coleman opinion points out that the prudent-person test and the marketability test are essentially the same; the latter is simply a logical extension of the former.

The parties agree upon this basic definition. Thus, the pivotal issue of the dispute lies in whether it was correctly applied to oil shale in the Freeman case. Freeman deals with two issues relating to the discovery of oil shale: (1) the extent to which a discovery of an outcropping of oil shale on the surface indicates to a prudent person the existence of a bed of oil shale below the surface substantial enough in size to warrant development; and (2) whether oil shale need be presently disposable at a profit. Since it is conceded by the government that the plaintiffs' claims contain substantial amounts of very rich oil shale, it is only the latter issue in Freeman which concerns us now.

Freeman held that the claimants did not have to prove that they could presently profit from the development of their oil shale claims:

> While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.
>
> It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit. (Emphasis added)

Valuable Resource

Freeman at 206. This case appears to extend the doctrine of discovery beyond the traditional limits of the paying and valuable mine test in Castle v. Womble and subsequent Supreme Court opinions adopting that principle. Those cases speak in terms of the present expenditure of labor and resources in order to develop a presently profitable mine, rather than the future developmental value of the mineral deposit. Roberts v. Morton, No. 75-1155 (10th Cir. Nov. 19, 1976) re-affirmed the present marketability test for alumina deposits located in oil shale land.

The claimants argue that "the present value of a mineral deposit is usually dominated by the present appraisal of the future," in other words, the estimated future worth of the oil shale should be discounted to current values. Plaintiffs' Opening Brief at 130-131. The administrative law judge in his findings of fact agreed with the claimants and expressly found that the future value of oil shale has a certain economic worth, even a substantial economic worth in present-day terms. The discounted future value of a mineral deposit may well be a significant factor to the prudent person in determining whether he can profitably develop the deposit. However, the discounted future value of a mineral deposit is by itself insufficient to meet the marketability and prudent person tests of Coleman and Castle v. Womble.

For purposes of these pre-1920 oil shale claims, however, Freeman does not represent an unwarranted extension of the traditional tests for discovery. Merely speculative claims are not discoveries of valuable mineral deposits under the Freeman standard. Freeman only extended the prudent person test to a mineral that the prudent person justifiably believed would inevitably become valuable, or would become marketable by the time the oil shale deposits could be sufficiently developed, and not only if the demand for the ultimate product were changed. Roberts, supra, Coleman, and Castle v. Womble are distinguishable because they did not have to consider the unique position of oil shale. Of most significance to our decision is the fact that because oil shale deposits contain a potential domestic source of energy, the government itself has acted to create a market and to encourage prudent investors to stake claims in oil shale deposits. Part V, infra.

Public Lands, 65th Cong., 1st Sess., pt. 4, at 250-253 (1917); Hearings on H.R. 3232 and S. 2812 Before the Ho. Committee on Public Lands, 65th Cong., 2nd Sess., at 811 et seq. (1918); 56th Cong. Rec. 6984-6987 (1918).

Although the Mineral Lands Leasing Act of 1920 indicated a sharp change in the government's policy of disposing of its material resources, §37 of that act, now 30 U.S.C §193, preserved existing, valid claims to oil shale. Few comments were made concerning this section, and even fewer were directed to the requirements of a valid discovery of oil shale. The remarks of Congressman Taylor of Colorado, one of the managers of the bill in the House, are typical:

> Yet the Senate and the House have both always retained in every bill of this kind the provisions of section 37 and expressly recognized and legalized and attempted to affirmatively protect the property and legal rights under the laws as they are now and have for over 40 years been on our statute books of the honest prospectors, the bona fide locators in good faith, and holders of rightful claims, claims that are valid and existing under existing laws at the date of the passage of this act. Those claimants, even though they may not have perfected a legal discovery under the laws are entitled to go ahead and maintain and perfect their claims under the present existing laws and obtain a patent to their lands just as though this bill had never been passed, and I hope no court or Federal department will ever attempt to deny to these people the rights which Congress looks upon as vested and is attempting in section 37 to guarantee to them.

59 Cong. Rec. 2711-2712 (1920). See also 59 Cong. Rec. 2709 (1920); 58 Cong. Rec. 4444 (1919); 58 Cong. Rec. 4579-4584 (1919).

The rule of discovery at that time was the prudent person test of Castle v. Womble. That would indicate that oil shale was subject to the same rigorous standards of profitability and commercial development as all other locatable minerals. However, as the extensive hearings make clear, Congress was fully aware that commercial development of oil shale was not yet technologically feasible. Despite this

knowledge, expressions in Congress were all in the direction and belief that oil shale lands were of tremendous value and, as Congressman Taylor's remarks indicate, that valid oil shale claims did exist.

On May 10, 1920, shortly after the passage of the Mineral Lands Leasing Act, the Department of Interior issued Instructions relating to oil shale placer claims. 47 L.D. 548 (herinafter Instructions). These Instructions were in response to the first application for patent of 14 oil shale placer mining claims under the 1920 Act. The purpose was to provide guidelines as to what constituted a discovery of oil shale under the new law. The Instructions held that consistent with the Department's prior position, oil shale was a valuable and, therefore, locatable mineral:

> The Department has had numerous inquiries as to the locatability and patentability of such deposits under the mining laws and in response thereto, while disclaiming any intention to expressing a binding opinion in the premises, it has nevertheless declared itself as favorable to the view that such deposits, if valuable, are subject to location and purchase under the mining laws...
>
> Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.

Id. at 549-551. The Instructions, therefore, determined that oil shale was sufficiently valuable to be discoverable. Only questions such as the size and richness of the deposits would appear to remain. That this is the correct interpretation of the Instructions is indicated by the fact that the 14 claims which occasioned the Instructions were granted patents.

The next Congressional action came in 1930-31, subsequent to the Freeman decisionwhich reaffirmed the principle of the 1920 Instructions

that oil shale was valuable for discovery purposes even though not presently profitable. The immediate cause of the Congressional review was the accusation by Ralph S. Kelly, Chief of the Field Division of the Department of Interior in Denver before his resignation in 1930, that the mining laws were being improperly administered with respect to oil shale. Among other things, he pointed to what he felt was a clearly erroneous decision in the Freeman case. 74 Cong. Rec. 7080-7083 (1931); Hearings on S. Res. 379 Before the Senate Committee on Public Lands and Surveys, 71st Cong. 3rd Sess. (1931); Consolidated Hearings on H.R. 3754, H.R. 12802, H.R. 13191, H.R. 15002, H.R. 15130, H.R. 15131, and H.R. 15132 Before the House Committee on Public Lands, 71st Cong. 2nd and 3rd Sess. (1931).

The discovery rule of Freeman was thoroughly explored by Congress. It was clearly understood that although commercial development of oil shale was not yet feasible, claimants were nevertheless receiving patents under Freeman based on oil shale's future value as a source of petroleum. Hearings on S. Res. 379, supra at 22-27. The hearings revealed that the Instructions and Freeman had already resulted in the patenting of 184,000 acres of oil shale lands, and that an additional 85,000 acres could be disposed of through pending patent applications. Consoldiated Hearings on H.R. 3754, supra at 181; H.R. Rep. No. 2537, 71st Cong., 3rd Sess., 4, 9 (1931); 74 Cong. Rec. 4100-4101, 4104 (1931).

Despite this thorough knowledge of the legal aspects and practical consequences of the Freeman doctrine, the oil shale legislation reported to the House did not modify the Freeman rule of discovery. H.R. Rep. No. 2537, supra; 74 Cong. Rec. 4102-4104 (1931). Furthermore, the Chairman of the Senate Committee on Public Lands, Senator

Gerald P. Nye, wrote to Secretary of Interior Wilbur that patenting should continue. Exhibit C-699 in the Administrative Record. The failure of Congress even to propose legislation that would alter the requirements of discovery under Freeman manifests its approval of that rule.

The most recent significant Congressional action affecting the patenting of oil shale claims was the passage of the Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. §122. This Act facilitates the patenting of oil shale claims preserved under 30 U.S.C. §193 by eliminating the requirement that the applicant must also obtain any outstanding patent to the surface rights. However, Congress did not specifically address the problem of discovery at all.

In summary, a review of the legislative history and subsequent administrative and Congressional action under the Mineral Lands Leasing Act of 1920 indicates that Congress intended and did, in fact, ratify a liberalized version of the traditional rule of discovery, as embodied in Freeman. Although it is difficult to discern the Congressional intent from the debates preceeding the enactment of the Mineral Lands Leasing Act of 1920, the 1920 Instructions, promulgated only three months later, disclose that oil shale was regarded as sufficiently valuable to be a legally discoverable mineral despite the lack of prospects for immediate profitable development. This administrative ruling should be accorded considerable weight (especially in view of the otherwise ambiguous Congressional intent), since it is a contemporaneous construction by those who are presumably intimately familiar with the legislative history and who are charged with the enforcement of the act. United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294,

315 (1933); United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 84 (1932); United States v. Philbrick, 120 U.S. 52, 59 (1887); Brennan v. Udall, 379 F. 2d 803, 806-807 (10th Cir. 1967), cert. denied, 389 U.S. 975.

As noted, in 1930-1931, a major investigation was conducted by Congress into the Department of Interior's patenting of oil shale lands, including an evaluation of the discovery rule of Freeman and the implications it held for further patenting of oil shale lands. The failure of Congress to modify or overrule the Freeman doctrine when presented with an opportunity to do so is a further indication of Congress' intent. Corn Products Refining Co. v. Commissioner of Internal Revenue, 350 U.S. 46, 53 (1955); United States v. Leslie Salt Co., supra at 397; Norwegian Nitrogen Products Co. v. United States, supra at 313; Kay v. FCC, 433 F. 2d 638, 646-647 (D.C. Cir. 1970). As was contemplated by Congress, the Department of Interior resumed patenting oil shale lands under Freeman.

That Congress should take a special attitude toward oil shale lands and ratify in Freeman an exception to the traditional discovery rule is explained by the unusual role of oil shale as a natural resource in contrast to other locatable minerals. As the Congressional hearings and debates have disclosed, oil shale was perceived as highly valuable and crucial to the national security and welfare. Congress believed that commercial development of oil shale would soon be feasible, because of its perception of the rapid depletion of existing sources of oil. That attitude has persisted, in varying degrees, to this day. Consequently, various means have been sought to foster the development of oil shale. One such technique was to liberalize the rules of discovery.

This long, stormy, and somewhat complicated Congressional and administrative involvement in the disposal of oil shale lands demonstrates Congressional approval of the Freeman rule of discovery. Consequently, the Courts should respect and apply the approved rule, in the absence of Congressional action to the contrary. An attempt by the Board of Land Appeals or this Court to overrule Freeman would be violative of Congressional legislative authority, and therefore improper. NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Fribourg Navigation Co., Inc., v. Commissioner of Internal Revenue, 383 U.S. 272, 283 (1966); Cammarano v. U.S. 358 U.S. 498, 511 (1959); Service v. Dulles, 354 U.S. 363, 380 (1957); Corn Products Refining Co. v. Commissioner, supra; National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361, 365-366 (1951); Willmette Park District v. Campbell, 338 U.S. 411, 417-418 (1949); Crane v Commissioner, 331 U.S. 1, 7-8 (1947); Brooks v. Dewar, 313 U.S. 354, 360-361 (1941); Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110,116 (1939); Brennan v. Udall, supra. The "re-enactment rule" enunciated in these cases should not be used in the absence of clear evidence that Congress was aware of the administrative regulation at the time of its review of the rules of discovery. Rothenberg v. U.S., 233 F. Supp. 864, 866-867 (D. Kan. 1964), aff'd., 350 F. 2d 319 (10th Cir. 1965); see also Davis, Administrative Law §5.07 (1958). Here, it is clear that Congress refused to modify the Freeman rule despite full knowledge of its existence and meaning.

V

For years, top administrators in the Interior Department have recognized the energy potential of oil shale. They themselves generated

A review of public announcements and events through the years will set the proper factual perspective for oil shale development and its potential in 1920. "Interest in the commercial development of oil shale has varied directly with the need for hydrocarbon fuels and inversely with. . . the availability of shale oil's chief competitor - conventional crude oil." Thomas A. Sladek, "Recent Trends in Oil Shale - Part 1: History, Nature, and Reserves," 17 Mineral Industries Bulletin 1, 3 (Nov. 1974). Until shortly after the discovery of oil at Titusville in 1859, the "U.S. shale oil industry. . . was a vital part of the American economy." Id.

For half a century thereafter, the oil shale industry lay dormant. At the beginning of the twentieth century, oil shale was regarded even by the speculator only as an indication of the existence of a nearby oil field:

> The tunnel stopped in shale, which is certainly what is known as oil shale, but nobobdy imagined that it contained oil...No tests have yet been made of the oil, but it is probable that a sample will be sent to some expert, and possibly the oil may be developed and piped down to the city before another year has passed.

"Oil Oozing from Breast of Cowenhoven Tunnel," The Denver Times at 11 (February 7, 1902).[3]

> "an expert operator...says he has never seen better indications for the development of a first class field, the shale encountered even in croppings is so thoroughly impregnated with oil that it burns readily and the indications of gas are to be found everywhere."

Oil in Rio Blanco," Id. at (May 21, 1907). See Also, "Irrigation Project," Id., at 6 (May 23, 1902); "Oil Excitement in Slate Creek District," Id. at 9 (Feb. 23, 1903).

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3. Local newspapers are an invaluable source for determining whether the "prudent person" prior to February 25, 1920 thought that an investment in oil shale deposits was mere speculation or was presently capable of being developed at a reasonable profit. The impact upon the beliefs of prudent persons can be determined from informative statements in newspaper articles. We do not consider them for the truth of the facts therein asserted, but only for their impact on the prudent mining investor. Rules 201 and 902(6), Fed.R.Evid. permit us to take notice of statements in newspaper articles without the necessity of authentication.

Geologists reinforced the view of Federal officials that the oil shale deposits ought to be mined, and would be mined at a reasonable net profit. See "Possibilities of State's Shales Outlined By Professor George," The Rocky Mountain News at sec. one (Jan. 1, 1918); "Natural Oil Running Short, But State Shale Will Produce For 800 Years," The Denver Times at 8 (Jan. 1, 1920).

Thus, the Government stressed the fact that oil shale deposits would inevitably become commercially marketable. This inevitability removed the pre-1920 claims in existing oil shale deposits from the realm of mere speculation, and gave them sufficient present value to constitute a valuable mineral deposit pursuant to 30 U.S.C. §22 et seq. While we agree with the Board that speculative future value is not a sufficient showing of present value to make oil shale a "valuable mineral," certain (or apparently certain) value in the near future is sufficient evidence of present value. In the Government's encouragement of early investment in oil shale, there was no suggestion that "dramatic technological breakthroughs" or unexpected "market changes" would be necessary in order to develop the oil shale deposits and make them profitable. The Board also stated that "in the 102 years since enactment of the general mining law, value has always been determined upon present facts, not upon possibilities of the future." Winegar, 16 IBLA at 168. This is incorrect in that the value of oil shale deposits has always been determined in accordance with its future potential.

Among those early prudent investors was Karl C. Schuyler, Sr., an authority on mining law, who became a United States Senator from Colorado in 1932. His partners included George A. Taff, an engineer who had been instrumental in the construction of the Pike's Peak

public confidence in the industry, and (c) the discovery of abundant oil reserves in Texas, which was the single most significant factor that diminished interest in oil shale. Id.

During World War II, the United States became more dependent on imported oil. In response to this need, Congress passed the Snythetic Fuels Act of 1944 "which acknowledged the importance of a reliable domestic supply of fuels and which provided the Bureau of Mines with a charter to establish such a supply from the domestic oil shale deposits. The Bureau began a research program that has continued to the present day." Id.

Once again, the discovery of oil in the Middle East, on the continental shelf of the United States, and in Alaska, crushed public interest in oil shale until the "energy crisis" of 1973. Id.

In the aftermath of the fuel embargo, public interest in oil shale and in other energy alternatives has remained high. Even today, when the Alaskan pipeline is nearly completed, reports on oil shale and synthetic fuels are given significant treatment by the press. See, e.g., "Oil-Shale Funds Blocked," The Denver Post 1 (Sept. 23, 1976); "Interior Predicts Competitive Shale," The Rocky Mountain News 27 (Sept. 13, 1976); "Colorado: Tomorrow, the West," The Denver Post (Sept. 5, 1976); "Is Oil Shale Dead?," The Straight Creek Journal 6 (Sept. 2, 1976); "Kleppe 'Stumped' On Oil Shale," The Denver Post (Aug. 30, 1976); "Oil-Shale Loan Plan Back," Id. (Aug. 29, 1976); "Dead Oil Shale Project Revived," Id. at p. 1 (Dec 1, 1976).

In November 1974, the Federal Energy Administration published its Final Task Force Report, Project Independence: Potential Future Role of Oil Shale: Prospects and Constraints. The FEA noted that estimates of oil shale resources have greatly increased since the 1920's, and

that Colorado has 84% of the higher grade reserves, which are among the finest and most easily mined in the world. Id. at 1. The Federal government owns 80% of the known resources, although there were thousands of claims filed on this public land prior to 1920, "when oil shale was a locateable mineral under the mining laws." Id. at 96. The Report urges that the Government lease or sell its land to private industry at a fair market value and in a manner that would achieve efficient resource allocation by approximating a perfectly competitive market. Because the government has refused to lease or sell its land, which contains the most valuable oil shale resources, private enterprises are unwilling to develop their privately held deposits. Id. at 101-102:

> a private developer will continue to be reluctant to develop private lands first so long as the possibility exists that at some future date, as a result of leasing public lands, the high grade resources would be available to potential competitors as well as whatever information the pioneering company had already developed. The situation has been assessed by the National Petroleum Council which has concluded that without the availability of public lands, development may be limited to one or possibly two plants with a combined production of 100,000 barrels per day by 1985, even though the potential is probably closer to 400,000 daily barrels. Id. at 102.

Even the upwardly revised cost estimates of shale oil production ($12 to $18 per barrel) indicate that shale oil could be presently competitive with oil imported from OPEC, especially if world oil prices rise. Report of the Department of the Interior, Mining and Minerals Policy 72 (July 1976). This report notes that the time required to determine the validity of claims filed on public lands when oil shale was a locateable mineral may impede commercial development. Id. at 73. See Project Independence, supra at 39. The Secretary of the Interior urged that a synthetic fuel commercialization bill be passed by Congress in 1976, in order to "encourage the development

of the industry and provide an incentive for accelerated leasing and production of shale oil," Id.

At about the same time, the GAO released a report to Congress entitled, An Evaluation of Proposed Federal Assistance for Financing Commercialization of Emerging Energy Technologies (Aug. 1976), wherein it recommended that the synthetic fuel commercialization bill not be passed:

> Synthetic fuels production--while technically feasible with first generation technologies--is not cost effective in that the total cost of output is not price competitive with foreign oil. Nor does it look as attractive when compared to other technologies, which we examined, on an incremental price basis. We believe synthetic fuels technologies would receive a high priority for Government research, development and demonstration efforts designed to develop more advanced and efficient production technologies, but we question whether assistance should be given to commercialization of synthetic fuels at the present time.

Id. at 48.

Faced with these polarized positions, on September 23, 1976, the House of Representatives defeated a proposed $4 billion loan guarantee as an incentive to produce synthetic fuel by a one-vote margin. Multiple economic, aesthetic, environmental, engineering, and political uncertainties throughout the field of energy resource development have led to this intense divisiveness within the federal government itself. Yet, the nation requires a stable, long-term policy regarding the development of oil shale deposits. Such a coherent energy resource policy is especially important today, when we have become much more reliant than before the "energy crisis" of 1973 upon foreign oil, when the future of nuclear energy remains unclear, and when other energy alternatives are technologically and economically more unrealistic than oil shale.

> Reliance on imported energy requires acceptance of a worsening of the balance of payments. In addition to the bleak monetary picture, a certain insecurity is inevitable when the operation of the nation depends to a large extent on a steady supply of fuel from an area of the world which has been in an almost continuous state of war for over 25 years.
>
> In the long run, the United States and its neighbors will need many other sources of energy besides petroleum, and oil from the abundant reserves of oil shale will probably be one of the alternative sources. There is certainly much current interest and involvement in the oil shale business. However, at the present time oil shale is at the mercy of many political and economic elements, and it is uncertain that the current efforts will be of sufficient duration to produce a mature shale oil industry.

Gladek, supra, at 3-4; See Hon. Wayne N. Aspinall "Oil Shale Development Handicapped by Government Indecision," 59 Quarterly of the Colorado School of Mines 91 (July 1964).

Because of the instability of the Government's energy policy, it has appeared prudent, at times, to invest in oil shale, while at other times, such investment has appeared merely speculative. While the courts cannot prevent the Government from having an unstable energy policy, the courts must prevent the Government from altering legal standards that have been relied upon by investors for the past half-century.

Since World War I, prudent mining investors and industrial giants have purchased oil shale land in the reasonable expectation that future profits would justify such purchases. See Winegar, supra at 134-138. The Standard Oil Company of California began to purchase Colorado land bearing oil shale in 1943 "for their oil shale resources," which Standard considered valuable. (Deposition of W.S. Svenson at 28). Since 1927, Texaco has acquired nearly 30,000 acres of oil shale land in Colorado and Utah in the belief that such an acquisition has been prudent. (Deposition of C.E. Moser at 47). Since 1955, Mobil Oil Co. has acquired about 20,000 acres of oil shale land, and holds an option to purchase about 12,000 other acres "in the expectation of

by the corporation by its president, a vice-president, secretary, an assistant secretary, or treasurer, and verified by the officer executing the report, or, if the corporation is in the hands of a receiver or trustee, it shall be executed on behalf of the corporation and verified by such receiver or trustee.

History: L. 1961, ch. 28, § 121.

Cross-References.

False reports by director, officer, or agent, misdemeanor, 76-13-6.

16-10-122. Filing of annual report of domestic and foreign corporations. —Such annual report of a domestic or foreign corporation shall be delivered to the secretary of state between the first day of January and the first day of March of each year, except that the first annual report of a domestic or foreign corporation shall be filed between the first day of January and the first day of March of the year next succeeding the calendar year in which its certificate of incorporation or its certificate of authority, as the case may be, was issued by the secretary of state. Proof to the satisfaction of the secretary of state that prior to the first day of March such report was deposited in the United States mail in a sealed envelope, properly addressed, with postage prepaid, shall be deemed a compliance with this requirement. If the secretary of state finds that such report conforms to the requirements of this act, he shall file the same. If he finds that it does not so conform, he shall promptly return the same to the corporation for any necessary corrections, in which event the penalties hereinafter prescribed for failure to file such report within the time hereinabove provided shall not apply, if such report is corrected to conform to the requirements of this act and returned to the secretary of state in sufficient time to be filed prior to the first day of April of the year in which it is due.

History: L. 1961, ch. 28, § 122.

16-10-123. Authority of secretary of state to collect fees and charges.— The secretary of state shall charge and collect in accordance with the provisions of this act:

(a) Fees for filing documents and issuing certificates.

(b) Miscellaneous charges.

(c) License fees.

History: L. 1961, ch. 28, § 123.

16-10-124. Fees for filing documents and issuing certificates.—The secretary of state shall charge and collect for:

(a) Filing articles of incorporation and issuing a certificate of incorporation, twenty-five dollars.

(b) Filing articles of amendment and issuing a certificate of amendment, twenty-five dollars.

(c) Filing restated articles of incorporation, and issuing a certificate, twenty-five dollars.

(d) Filing articles of merger or consolidation and issuing a certificate of merger or consolidation, twenty-five dollars.

16-10-125. Miscellaneous charges.—The secretary of state shall charge and collect:

(a) For furnishing a certified copy of any document, instrument, or paper relating to a corporation, thirty-five cents per page and one dollar for the certificate and affixing the seal thereto.

(b) At the time of any service of process on him as resident agent of a corporation, five dollars, which amount may be recovered as taxable costs by the party to the suit or action causing such service to be made if such party prevails in the suit or action.

History: L. 1961, ch. 28, § 125.

16-10-126. License fees payable by domestic corporations.—The secretary of state shall charge and collect from each domestic corporation license fees, based upon the number of shares which it will have authority to issue or the increase in the number of shares which it will have authority to issue, at the time of:

(a) Filing articles of incorporation;

(b) Filing articles of amendment increasing the number of authorized shares; and

(c) Filing articles of merger or consolidation increasing the number of authorized shares which the surviving or new corporation, if a domestic corporation, will have authority to issue above the aggregate number of shares which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this state had authority to issue.

License fees shall be at the rate of one-twentieth of one per cent of the dollar value of the total authorized shares except that (i) no fee due at the time of filing articles of incorporation shall be less than $25 and (ii) no fee shall be more than $500. For purposes only of computing fees under this section, the dollar value of each authorized share having a par value shall be equal to such par value and the dollar value of each authorized share having no par value shall be equal to $1.00.

The license fees payable on an increase in the number of authorized shares shall be imposed only on the increased number of shares, and the number of previously authorized shares shall be taken into account in determining the rate applicable to the increased number of authorized shares. Total license fees for previously authorized shares together with the increased number of shares shall not exceed $500.

History: L. 1961, ch. 28, § 126; 1971, ch. 22, § 10.

Compiler's Notes.

The 1971 amendment, in the next to last paragraph, substituted the provisions of "(i)" and "(ii)" for "no fee shall be less than $25.00 nor more than $1,000.00" and reduced the value for shares having no prior value from "$10.00" to "$1.00"; in the last paragraph, added "and the number of * * * authorized shares" to the first sentence and added the second sentence, limiting total license fees.

Cross-Reference.

Effect of 1971 amendment, 16-10-144.

16-10-127. License fees payable by foreign corporations.—The secretary of state shall charge and collect from each foreign corporation li-

UNITED STATES GOVERNMENT

Memorandum

Attachment 1

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Utah State Office

Jim R.

IN REPLY REFER TO:
3870
(U-942)

File

To : District Manager, Vernal

Date: MAR 10 1977

From : State Director, Utah

Subject : United States of America v. Paul M. Koenigsmark, et al., Utah Contest Nos. 10706, 10707 and 10708

Attached for your information is a copy of the order continuing the hearing in the above matter. This hearing has been continued until final resolution of the State Selection Litigation mentioned in the order.

Paul L. Howard

Enclosure

EMPLOYEE	Action	Initial	Info.
Dist. Mgr.			
Administration			
Chief Div. R.			
Land Use Pl			
Pet. Op.			
Par	MAR 11 1977		
Dis			
Ec. Anal.			
Fil E. Mgmt.			
File			
Remarks			

RECEIVED
MAR 16 77
WHITE RIVER SHALE PROJECT
Vernal, Utah

SEND: _____
COPY: _____
_____
FILE _____

DSC-1541-2
Mar. 1974

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

February 15, 1977

Routing:
Nielson
Robison
McConkie
Staten
Pendergrass
Nelson
Smith
File:

ORDER

UNITED STATES OF AMERICA, Contestant v. PAUL M. KOENIGSMARK; EUGENE D. BARRON: STERLING P. BARRON, II; and PEGGY K. STOLBERG (a/k/a MARGARET KATHERINE STOLBERG, Executrix of the Estate of HELEN D. KOHLBERG, deceased, and sole surviving heir of HELEN D. KOHLBERG), Contestees	UTAH 10706 Involving the Omega Claims 1-4, 6, 8-15, located in Sec. 1: all; Sec. 2: Lot 7; Sec. 11: NW^4; Sec. 12: all; Sec. 14: NE^4; Sec. 19: Lots 3, 4, E^2SW^4; T. 10 S., R. 24 E., S.L.M., Uintah County, Utah.
UNITED STATES OF AMERICA, Contestant v. PAUL M. KOENIGSMARK, Contestee	UTAH 10707 Involving the Ignacio Placer Mining Claims 17-19, 29, 69-76, 78, 79, 83, 109-132, located in Sec. 5: Lots 1, 2, S^2NE^4, S^2; Sec. 8: NE^4; Sec. 18: all; Sec. 19: all; Sec. 20: S^2; Sec. 21: SW^4; Secs. 28-33: all; T. 10 S., R. 25 E., S.L.M., Uintah County, Utah.

UNITED STATES OF AMERICA,	:	UTAH 10708
	:	
Contestant	:	Involving the Shale Placer Mining Claims Nos. 1-6, 9-60, 65-96, 99-124, 129-140; located in Sec. 1: all; Sec. 2: Lot 7; All of Secs. 3-15; All of Secs. 17-24; Sec. 25: W^2W^2; All of Secs. 26-31; All of Secs. 33-35; T. 10 S., R. 24 E., S.L.M., Uintah County, Utah.
v.	:	
PAUL M. KOENIGSMARK,	:	
Contestee	:	

Hearing Continued

On February 14, 1977, a hearing was held on the contestant's motion to continue the hearing scheduled for February 24, 1977. Everyone shown on the distribution list at the end of this order appeared at the hearing with the exception of John C. Beaslin, Esq. The State of Utah withdrew its objection to the contestant's motion for a continuance. No other objections have been made to the requested continuance.

The motion is granted. The hearing will be continued to a date subsequent to the decision of the Tenth Circuit Court of Appeals in State of Utah v. Kleppe, USDC-Utah, C-74-64.

Robert W. Mesch

Robert W. Mesch
Administrative Law Judge

See page 3 for distribution

Distribution:

Reid W. Nielson
Regional Solicitor
U. S. Department of the Interior
6201 Federal Building
Salt Lake City, Utah 84138
[Representing contestant]

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Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
[Representing State of Utah]

Dallin W. Jensen, Esq.
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442 State Capitol Building
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Richard L. Dewsnup, Esq.
Special Assistant Attorney General
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[Representing State of Utah]

William T. Thurman, Esq.
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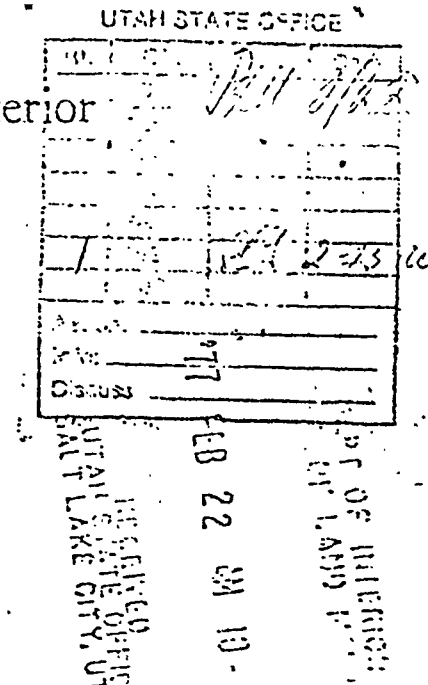
Salt Lake City, Utah 84133
[Representing Eugene D. Barron,
Sterling P. Barron II, and
Peggy K. Stolberg]

John C. Beaslin, Esq.
Beaslin, Nygaard, Coke & Vincent
185 North Vernal Ave., Suite 1
Vernal, Utah 84078
[Representing Paul M. Koenigsmark]

Robert P. Hill, Esq.
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah 84111
[Representing Sunoco Energy
Development Co., Sohio Petroleum
Co., Phillips Petroleum Co., and
White River Shale Oil Corp.]

United States Department of the Interior

OFFICE OF THE SOLICITOR
SUITE 6201, FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138



February 18, 1977

Memorandum

To: State Director, Utah, BLM, SLCU

From: Regional Solicitor, SLCU

Subject: United States v. Paul M. Koenigsmark, et al.
Utah 10706, 10707, 10708

Enclosed for your information and files is a copy of Order dated February 15, 1977, continuing the hearing without date in the above-subject matter.

REID W. NIELSON
Regional Solicitor

Enclosure

RWN:sm

'77 JAN -1 AM 10:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

SHELL OIL COMPANY and D.A. SHALE, INC.,

Plaintiffs,

vs.

THOMAS S. KLEPPE, Secretary of the Interiror,

Defendants.

Civil Action No. 74-F-739

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS

Discovery

THIS MATTER is before the Court on cross-motions for summary judgment. This case is another installment of the long-enduring and multi-faceted litigation over oil shale, a mineral principally located in the Western states. For the ten year history of oil shale litigation, see The Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966), aff'd, 406 F. 2d 759 (10th Cir. 1969), rev'd sub nom., Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), conformed to, The Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973), remanded Sept. 22, 1975 (10th Cir.), cert. denied, The Oil Shale Corp. v. Kleppe, No. 75-1436 (June 21, 1976), dec'n pending, No. 8680 (D.Colo.).[1]

In the instant litigation, Plaintiffs seek judicial review of a decision of the Board of Land Appeals in the Department of Interior, United States v. Frank W. Winegar, et al., IBLA 70-549, June 28, 1974, reported at 16 IBLA 112, 81 I.D. 370 (hereinafter Winegar), in which plaintiffs' oil shale placer mining claims were held invalid on the ground that these claims did not constitute discoveries of a valuable mineral deposit pursuant to 30 U.S.C. §22 et seq. We have reviewed the Winegar decision, the voluminous briefs, the extensive administrative record, and have undertaken our own independent research. Plaintiffs Motion for Summary Judgment is GRANTED.

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1. Other oil shale cases have recently been before this Court. United States v. Exxon Oil Co., C-4139 (Complaint filed July 11, 1972); U. Mobil Oil & Exxon Oil Co. C-4135 (Settled Nov. 1, 1976); Amerada Hess Corp. v. Morton, C-4361 (Complaint filed September 26, 1972

I

The factual background of this litigation is set out in detail in Winegar. The six oil shale placer mining claims in dispute, Mountain Boy Nos. 6 and 7 and Harold Shoup Nos. 1, 2, 3, and 4, were located in 1917 under the Act of May 10, 1872, 30 U.S.C. §22 et seq. The Mineral Lands Leasing Act, 30 U.S.C. § 181 et seq., subsequently withdrew oil shale from location but preserved "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the law under which initiated, which claims may be perfected under such laws, including discovery." 30 U.S.C. §193. By various mesne conveyances, the plaintiffs acquired title to the claims.

The instant controversy began on September 8, 1964, when the Manager, Colorado Land Office, Bureau of Land Management, issued complaints on behalf of the United States alleging the invalidity of the claims due to a failure to discover a valuable mineral deposit. The traditional standard for determining that a valuable mineral deposit had been discovered is whether or not a prudent person would be justified in believing the deposit could be developed, extracted, and marketed at a reasonable profit. Freeman v. Summers, 52 L.D. 201 (1927) (hereinafter Freeman), held that present development and marketability at a reasonable profit is not necessary for deposits of oil shale. Rather, the claimant must only establish that the oil shale deposits constitute a valuable resource for future use and development.

Administrative Law Judge Dent D. Dalby found that the claimants did not meet the standard mining law test for a valuable resource. If he had been ruling as a matter of first impression, he would have

Mining Claims on Ua Ub Oil Shale Land.

February 15, 1977 - United States of America contestants V.S. Paul M. Koenigsmark and others, contestee.

The govrnment asked for a continuance until the 10th District Court of Appeals decision on the Utah v.s. Kleppe was issued.

These claims cover practically all the Ua Ub tracts.

The State of Utah withdrew its objection to the continuance.

This action continues the cloud on the state and Federal title to the Ua-Ub leased land. (Evidently the B.L.M. did not want to clear the title for the state selection).

White River Shale Companies must sue the Federal Government for a continuance or lose the right to recover the payments etc. made in good faith on the federal lease or pay an additional payment on a clouded title.

The state and the federal government have been notified.

Mitchell Melich will file the suit in 10th District Court in Salt Lake City.

The case must be filed before August 1, as that is the latest date an application for an additional one year extension of their leases can be filed.

The original basis for an extension have not changed, but politically the mining supervisors office feel he can not recommend an extension of the lease terms.